MORRISON | FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP

BEIJING, BERLIN, BRUSSELS, DENVER, HONG KONG, LONDON, LOS ANGELES, NEW YORK, NORTHERN VIRGINIA, PALO ALTO, SACRAMENTO, SAN DIEGO, SAN FRANCISCO, SHANGHAI, SINGAPORE, TOKYO, WASHINGTON, D.C.

July 9, 2015

Writer's Direct Contact
415.268.6294
RFalk@mofo.com

By Email (mrp.reissuance@waterboards.ca.gov) and Overnight Delivery

MRP Tentative Order Comments
Attn. Dale Bowyer
S.F. Bay Water Board
1515 Clay Street, Suite 1400
Oakland, California 94612

Re: **Public Comment Submission -- Draft Municipal Regional Stormwater Permit**

On behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("Santa Clara Program") and its member co-permittees,[1] the following are legal comments concerning the Proposed Tentative Order ("TO") and accompanying documents (including Fact Sheet) for reissuance of the Municipal Regional Stormwater NPDES Permit ("MRP" or "Draft Permit") as released for public comment on May 11, 2015.[2]

OVERVIEW: The Draft Permit, while ambitious and containing requirements reaching beyond the maximum extent practicable standard set forth in Section 402(p) of the Clean Water Act, represents a highly laudable effort by the Water Board's staff and is largely worthy of support by members of both the environmental and regulated communities and the public at-large. Accordingly, subject to requested clarifications being made and several legal issues being resolved as discussed below, the Santa Clara Program and its members are generally appreciative and supportive of the Draft Permit.

LEGAL COMMENT No. 1 (Permit v. Fact Sheet Issue): Notwithstanding the feedback presented above concerning the Draft Permit, the Santa Clara Program and its members take issue with several aspects of the Fact Sheet. Among other things, they specifically object to

[1] The Program member co-pemittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District. The Santa Clara Program will be submitting additional non-legal comments under its own letterhead, and many of the co-permittees may be submitting separate comments as well.

[2] The Santa Clara Program also supports the legal comments being submitted by Gary Grimm on behalf of the Alameda Program.

having the reissued MRP incorporate the Fact Sheet by reference rather than to merely refer to the Fact Sheet's availability and existence. Incorporation of the Fact Sheet is, in fact, legally inappropriate – under the NPDES regulations, a fact sheet is only supposed to "accompany" a draft permit and set forth facts and describe questions considered in preparing it; it is not supposed to piecemeal the permit and contain what amounts to additional findings or requirements themselves. See 40 C.F.R. §§ 124.6, 124.8.

LEGAL COMMENT No. 2 (Unfunded State Mandates Issues): The Fact Sheet's lengthy discussion of State Mandates, which appears to merely repeat the State Water Board's conclusory litigation advocacy position on these issues, goes well beyond the scope of 40 C.F.R. §§ 124.6, 124.8 and should be deleted. This is particularly the case in light of the California Supreme Court's impending decision in *Department of Finance, et al. v. Commission on State Mandates/County of Los Angeles, et al*., Case No. S214855, which will clarify, among other things, that jurisdiction to determine what aspects of the Draft Permit constitute unfunded state mandates properly rests with the Commission on State Mandates and not with the State's Water Boards.

In addition (and even if the California Supreme Court's decision is otherwise), in its recent final rule defining the "Waters of the United States," U.S. EPA has expressly *excluded* from the reach of the jurisdictional boundaries of the Clean Water Act (and, hence, the NPDES permitting program) numerous areas that are subject to requirements in the T.O., including, among others, pools and erosion and other control features constructed on land in order to convey, treat, or store stormwater. 80 Fed. Reg. 37054, 37096-37101 (June 29, 2015). Therefore, to the extent the reissued MRP imposes requirements that reach to such now-clearly excluded non-jurisdictional areas and features, such requirements arise from state rather than federal law and are subject to subvention under the State's unfunded mandates initiative, as well as to the need for analysis under Water Code Section 13241/13243 and the California Environmental Quality Act (CEQA).[3]

LEGAL COMMENT No. 3 (Finding 11 Clarification Issue): To avoid ambiguity that could result in years of unnecessary resource-draining litigation through the courts similar to that previously experienced in Southern California, the T.O.'s Finding 11 needs to be further clarified with respect to the relationship between Draft Permit Provisions A.2, B.1-B.2, and C.1. More specifically, Finding 11 should be expanded or supplemented to recognize the

[3] The Santa Clara Program and its members reserve all their rights to pursue unfunded mandate challenges to a reissued MRP under applicable law, including as it may be further clarified by the California Supreme Court. They also wish to ensure that the record is clear that they have not waived such rights, including by volunteering through their comments, prior suggestions, previous actions, permit re-applications, or generally strong desire to cooperate with the Water Board's staff, to be deemed to have voluntarily accepted any of the new program or higher level of service requirements contained in the T.O., including without limitation Provisions C.3.j, C.10.a.i., C.10.a.ii.b, C.10.b.i.a and b, C.10.b.v, C.11.c, C.12.c., C.12.f.

State Water Board's June 16, 2015 adoption of precedent order WQ-2015-0075 concerning Receiving Water Limitations ("State RWL Order"), and it should expressly state that, consistent with guiding principles set forth in the State RWL Order, Provisions C.1 and C.9-14 are designed to provide the co-permittees with an alternative compliance pathway relative to Receiving Water Limitations B.1 and B.2 and Discharge Prohibition A.2 with respect to pesticides, trash, mercury, polychlorinated biphenyls, copper and bacteria.

LEGAL COMMENT No. 4 (Provision C.1 Clarification Issue): As it reinforces and clarifies this Water Board's longstanding approach in municipal stormwater permitting relative to the management of pollutants of concern and exceedances of water quality standards and will thereby help avoid unnecessary litigation, the Santa Clara Program and its members strongly support Provision C.1's recognition that compliance with Provisions C.9-C.14 will constitute compliance with Receiving Waters Limitations B.1 and B.2 and that compliance with Provision C.10 will further constitute compliance with Discharge Prohibition A.2. The second sentence of Provision C.1 should, however, end immediately after "Receiving Water Limitations B.1 and B.2" as the words beyond that point are unnecessary, confusing, and could give rise to resource-draining litigation. Consistent with its intent and all prior municipal stormwater permits issued by this Water Board, to further avoid unnecessary litigation, the reference in the third sentence to "Discharge Prohibition A.2" should be changed to "A.1 and A.2." Finally, the word "copper" appears to have inadvertently omitted from the list of pollutants of concern in the last sentence of the first paragraph in Provision C.1 and should be restored there.

LEGAL COMMENT No. 5 (Provision C.14 Clarification Issue): So as to avoid unnecessary and resource-draining litigation and more fully effectuate the alternative compliance pathway set forth in Provision C.1 for water quality standard exceedances involving bacteria, Provision C.14 needs to be clarified to define the co-permittees' compliance obligations relative to receiving waters *other than* San Pedro Creek and Pacifica State Beach. This could be accomplished by addition of a new subprovision in C.14 that delineates such "For Other Receiving Waters" bacteria-related requirements. Alternatively, since Provision C.8.d.vi. already delineates detailed requirements for investigating pathogen (including Enteroccoci and *E. coli*) contamination in local creeks and areas where water-contact recreation is likely, allocates responsibility for addressing such requirements among co-permittees, and defines a quantitative performance criteria to trigger follow up action under C.8.e, the same result might more easily be accomplished through the addition of a very short additional statement in the opening paragraph of Provision C.14 which speaks to the co-permittees' responsibilities for other receiving waters and then just provides a summary cross-reference to Provision C.8.d.vi.

LEGAL COMMENT No. 6 (Provision C.10 Trash Issues): The Santa Clara Program and its members recognize the importance of better trash control to this Water Board and the Bay Area community and are generally supportive of T.O. Provision C.10. However, while it improves over the current MRP's parallel provision, there remain a number of legal issues with regard to it. First, as per Legal Comment No. 4 (and since it covers both the wet and dry seasons), to reduce the potential for unnecessary litigation about it, at its outset, Provision C.10 should reference Discharge Prohibition A.1 in addition to A.2.

Second, as was true under the current MRP and noted under Legal Comment No. 2 above, because Provision C.10 extends its requirements beyond the jurisdiction of the Clean Water Act as recently clarified by US EPA, it reaches beyond the NPDES program's confines and, to this extent, requires a not-yet-provided analysis of technical feasibility and economic reasonableness pursuant to Sections 13263 and 13241 of the Water Code as well as potential analysis under CEQA.

Third, even if it was contemplated under the current MRP and is consistent with the prior long term vision of the Water Board, the increase of an actual trash reduction requirement from 40% to 70% from 2009 levels by July 1, 2017 in Provision C.10.a clearly represents a new requirement and/or calls for a higher level of service. It therefore constitutes an unfunded mandate and should be conditioned on the co-permittees' prior receipt of State-provided funding for the programs necessary to reduce trash loadings by an additional 30%.[4]

Finally, the requirement for achieving 100% trash reduction/no adverse impact by July 1, 2022 in Provision C.10.a (which is described as a "mandatory deadline" rather than as a long term target) illegally extends beyond the five year term of this NPDES permit cycle (see Water Code Section 13378) and should be deleted or restated to just represent an aspirational future goal.

LEGAL COMMENT No. 7 (Provision C.11 and C.12 Mercury and PCB Issues): While not seeking to legally challenge them when they were adopted, the Santa Clara Program and its members have long questioned the technical basis and feasibility of the total maximum daily loads ("TMDLs") and associated allocation/implementation plans and timetables adopted by the Water Board for mercury and PCBs. These TMDLs deal with legacy pollutants already in the Bay. Trying to achieve massive load reductions in current discharges to offset what is already in the receiving water as the result of historical activities through the imposition of requirements on current discharges simply is unrealistic and will not lead to attainment of water quality objectives within the timetables the TMDLs contemplate. These TMDLs fundamentally need to be revisited and revised under the adaptive management principles as was expressly contemplated at the time of their adoption.

[4] Relative to the preceeding paragraph, the Water Board has also not shown that this large trash loading reduction increment is technically feasible or economically reasonable.

The sooner such revision occurs, the better, so that more realistic, technically feasible, and economically achievable municipal stormwater permit requirements can be better calculated.

Without deemphasizing the critical importance of the above, the Santa Clara Program and its members are not *conceptually* adverse to the general approach reflected in T.O. Provisions C.11 and C.12, and they appreciate that these Provisions recognize that green infrastructure is likely the best way to address mercury and PCB impairment in the Bay over time.[5] However, as discussed further below, Provisions C.11 and C.12 (and the related explanations of them in the Fact Sheet) *must be significantly clarified* to withstand legal muster.

First, as currently drafted, the references to numeric load reduction performance criteria in Provisions C.11.c and C.12.a and c are impermissibly vague and ambiguous such that they may be misinterpreted by some to contain numeric water quality based effluent limitations ("NELs") rather than numeric action levels ("NALs") or similar mechanisms. The distinction is of critical importance as NALs will, where quantitative performance criteria cannot be fully addressed, trigger requirements for the co-permitees to report on the circumstances giving rise to that situation and identify additional actions and time schedules acceptable to the Executive Officer to further address them. In contrast, NELs would trigger liability for a permit violation *even if* the inability to achieve them within the timetable required were beyond the capability of the co-permitees and/or subject to being reasonably addressed by the further action plans they submit and are directed by the Executive Officer to implement.

The Water Board must therefore expressly clarify *the type* of numeric requirement it is imposing in C.11.c and C.12.a and c in order to legally adopt the permit under the NPDES regulations and principles of due process of law. *See Connally v. General Constr. Co*. 269 U.S. 385 (1925). Specifically, it needs to revise these subprovisions (and associated aspects of the Fact Sheet) to specify that the quantitative performance criteria they reference *are* NALs (or similar mechanisms), *not* NELs. Indeed, directly enforceable NELs would be inconsistent with the Basin Plan, the State Board's most recent (and consistent) direction on this subject, and U.S. EPA's most recent guidance memorandum on implementing TMDL requirements in municipal stormwater permits.[6]

---

[5] While conceptually supportive of green infrastructure implementation and other PCB-specific related control measures, SCVURPPP and its members do not waive their right to contend that the T.O.'s prescription of them as the means of achieving specified load reductions violates Water Code Section 13360; nor do they waive their rights to contend that these are requirements for new programs and/or higher levels of service imposed based on State discretion.

[6] US EPA "Revisions to the November 22, 2002 Memorandum 'Establishing Total maximum Daily Load (TMSL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'," November 26, 2014 ("EPA Memo").

While all three of these legally controlling documents recognize the *potential* for the *eventual* use of NELs to address TMDLs, they also recognize that NALs and other alternative requirements must be used where NELs have not yet proven feasible for stormwater, as the State Board has repeatedly found in recent years.[7] Indeed, the State RWL Order specifically states: "from a policy perspective, we find that MS4 Permittees that are developing and implementing [alternative compliance measures] should be allowed to come into compliance with . . . *interim and final TMDLs* through provisions built directly into their permit rather than through enforcement orders" – i.e., enforcement orders that could arise from non-compliance with NELs per se.[8] The EPA Memo expressly conditions the use of NELs in municipal stormwater permits on feasibility and emphasizes that MS4 permit writers "have significant flexibility" to use "various forms of clear, specific and measurable requirements" as alternatives to NELs where they have not been shown to be feasible. EPA Memo at 4-5.

Beyond this critical definitional issue, Provisions C.11.c and C.12.c also need to be clarified to focus their requirements and associated performance criteria on local government *approvals* of public and private projects relative to them incorporating green infrastructure features that will help reduce mercury and PCB loads. While municipalities can, with great effort and significant resources, reasonably be expected to put into place green infrastructure plans in the initial years of this permit term and may even be expected to apply green infrastructure requirements to *their approvals of* public and private projects expeditiously so that opportunities are not lost, local governments cannot control the number of project applications they receive or fully control the pace of CEQA review, funding approval, or actual construction build-out timetables associated with such projects.

Therefore, because co-permittees lack sufficient control to assure that numerically denominated quotas of mercury and PCB load reductions will be realized in each of the last three years of the permit, as currently stated, these green infrastructure requirements are contrary to the Basin Plan (and this remains the case regardless of whether such quotas are

[7] The State Water Board's expert input on this subject concluded that numeric effluent limitations are not yet feasible for municipal stormwater. State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006). The State Water Board has subsequently found that this remains the case even for non-municipal stormwater discharges and, accordingly, it deleted NELs from the Construction Storm Water General Permit Order No. 2009-0009-DWQ and even, more recently, from the Industrial Storm Water General Permit (Order No. 2014-0057-DWQ).

[8] The State RWL Order also repeatedly recognizes that requiring strict compliance with water quality standards, and, hence, TMDL requirements and waste load allocations, is a matter of discretion relative to municipal storm water permits such that, under a California Supreme Court decision favoring the Commission, these requirements would undoubtedly constitute unfunded mandates if so challenged.

defined on a permitwide, program/countywide, or proportionate co-permittee specific basis).[9] Accordingly, in addition to being clarified as to the use of NALs rather than NELs, these T.O. requirements must be revised to *refocus* the achievement of the performance criteria denominated in Tables 11.1 and 12.2 on loading reductions that will *arise from project approvals* issued within the permit term. To the extent the number of projects approved within the final three years of the permit term are not sufficient to give rise to loading reductions fully meeting the performance criteria due to circumstances beyond local government control, the co-permittees should also be allowed to address this in a report and plan submission that will afford them additional time without being in noncompliance for the reasons stated above.[10]

Second, for the numeric performance criteria in Provisions C.11.c and C.12.a and c to stand up as legal, the co-permittees must, *at the time of permit adoption*, be given a defined, certain and reliable means by which their efforts to meet them will be measured. *See Connally, supra.* As currently written, Provisions C.11.b and C.12.b fail to do so because they put off until *after* the adoption of the T.O. a determination about whether the assessment methodologies developed in 2013 will govern these measurements throughout the permit term or, at some point within the next five years, could or will be replaced with a different means to calculate whether the numeric performance criteria are adequately being addressed.

In this regard, the potential post-permit adoption change in determining the measurement system to be used is the equivalent of an illegal ability to move the finish line after the race has begun. While it seems unnecessary given their 2013 submissions, if developing an enhanced assessment methodology during the course of the permit term for application to requirements in *future* permits is still something to which the Water Board decides to ask the co-permittees to devote their limited resources,[11] Provisions C.11.b and C.12.b must otherwise be refined to provide that the 2013 assessment methodologies will be the ones applied to the numeric performance criteria *throughout this permit term* and not just on an interim basis.

[9] As they are not uniformly distributed throughout the Bay Area and are concentrated based on the time period in which development, particularly of industrial facilities, occurred in certain parts of it, the Santa Clara Program and its members do not believe there is a factual basis for, and take particular issue with, the default denomination of potential program/countywide or derivative co-permittee-specific load reductions quotas for PCBs derived on a proportion of the population basis.

[10] These revised approaches are especially justified in circumstances like this where the TMDL implementation plans in question have many more years to run and adaptive management and adjustments in final waste load allocations and their timetables are likely in the interim.

[11] Of course, asking the co-permittees to do such would constitute a new requirement imposed at the discretion of the state.

Finally, as noted under Legal Comment No. 2 above, Provision C.12.f appears to be a requirement for a new state-imposed program concerning the regulation of construction demolition on properties often lying outside of the jurisdiction of the federal Clean Water Act. As such, it subject to the unfunded mandates initiative and requires an analysis of technical feasibility and economic reasonableness pursuant to the Water Code as well as the need for potential analysis under CEQA. In these regards, local governments do not have the resources or fee authority to fund such a requirement and the framework it contemplates much more sensibly should be developed at a state or federal level given that, like the case with asbestos and lead paint, the issue of PCBs in historic building materials is national or at least statewide in scope and its widespread environmental and human health risk implications.

LEGAL COMMENT No. 8 (Provision C.15 Potables Coverage Issue): Provision C.15.b needs to be revised to restore coverage of non-emergency planned and unplanned potable water (drinking water) system discharges. There is no evidence in the record or otherwise available that the Santa Clara Program's existing conditionally exempt non-emergency planned and unplanned potables discharge program has not been effective or that, to continue to protect water quality, the relevant co-permittees instead require regulation in an alternative manner through State Water Board Order WQ 2014-0194-DWQ ("State Potables Permit"). There is also no evidence from the proceedings that governed the adoption of the original MRP to support the contention in the Fact Sheet that the current non-emergency planned and unplanned potable discharges requirements were ever intended to be interim or temporary in the first instance, as was also suggested in the staff presentation on this issue at the June 10, 2015 hearing on the T.O.[12]

Indeed, the State Potables Permit was specifically amended prior to its adoption to provide that drinking water system discharges which are or can be addressed through a municipal stormwater permit issued by a Regional Water Board will be regulated in that manner so as to avoid a situation where a municipality has to obtain separate coverage under two permits and pay two separate permit fees or be on two separate reporting cycles. State Potables Permit at I.A.3, Attachment B2, Attachment F.I.B, Attachment F, Response to Comments Submitted on 8/19/2014 on Drinking Water System Discharges. The State Water Board specifically directed all Regional Water Boards to continue to specify potable discharge requirements in municipal stormwater permits and, on a going-forward basis, it left it up to them as to how best to craft such requirements. Response to Comments Submitted on 8/19/2014 on Drinking Water System Discharges.

[12] Removing coverage for non-emergency potable discharges from Provision C.15.b and effectively demanding that water purveyor co-permittees instead devote additional resources to revise the compliance programs and reporting structures they have established under the current MRP and pay fees for and obtain a second NPDES permit also represents a state mandate for a new program or higher level of local government service.

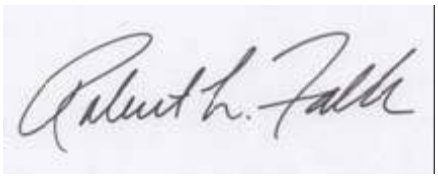
Hence, this Water Board should either restore Provisions C.15.b.iii (1) and (2) from the current MRP or craft new subprovisions specifying alternative substantive requirements for MRP co-permittees responsible for planned and unplanned potable discharges. Indeed, this Water Board has a wide array of options in the latter regard it wishes to streamline its prior approach – given their lack of water quality impact, such discharges could, for example, simply be designated as unconditionally exempt categories under Provision C.15.a. (US EPA's municipal stormwater permits allow non-stormwater discharges of this nature to be covered as unconditionally exempt absent an affirmative and specific showing in the record that they have proven to be sources of pollutants at levels that affect receiving water quality; the State Water Board's General Permit for stormwater discharges from industrial activities also takes this approach. State Board Order 2014-0057-DWQ at IV.A.2.)

Alternatively, if consistency with the State Potables Permit is the paramount concern, then the Water Board could easily create a new short subprovision for planned and unplanned emergency discharges within Provision C.15.b that would summarily specify that "Potable water discharges that meet the Discharge Specifications set forth in Section IV.A or the Multiple Uses or Beneficial Reuse terms set forth in Section VI of the Statewide General NPDES Permit for Drinking Water Systems Discharges, Order WQ 2014-0194-DWQ shall be deemed to be conditionally exempt provided that the Permittees maintain records of these discharges, BMPs implemented, and any monitoring data collected." However, what is not needed or justified and is contrary to the State Board's intent and expressed direction on this issue is the current approach of not addressing these non-emergency planned and unplanned potable water discharges within Provision C.15 at all.

* * * * *

Thank you for the opportunity to submit these comments on behalf of the Santa Clara Program and its co-permittees. We look forward to continuing to work with the Water Board staff with respect to trying to cooperatively resolve the concerns we have raised so that future legal challenges can be avoided.

Sincerely yours,



Robert L. Falk

cc via email:
Bruce Wolfe
Tom Mumley
Santa Clara Program Management Committee
Adam Olivieri